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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

SIDNEY NAIMAN, individually and) Case No.
on behalf of all others similarly)
situated,	) <u>CLASS ACTION</u>
)
Plaintiff,	) COMPLAINT FOR VIOLATIONS
	) OF:
vs.)
	) 1. NEGLIGENT VIOLATIONS OF
	) THE TELEPHONE CONSUMER
	) PROTECTION ACT [47 U.S.C.
POSITIVE ENERGY SOLUTIONS,	) §227 ET SEQ.]
LLC and DOES 1 through 10,	) 2. WILLFUL VIOLATIONS OF THE
inclusive, and each of them,	) TELEPHONE CONSUMER
	) PROTECTION ACT [47 U.S.C.
	) §227 ET SEQ.]
Defendants.)
	) <u>DEMAND FOR JURY TRIAL</u>
)

Plaintiff, SIDNEY NAIMAN (“Plaintiff”), individually and on behalf of all others similarly situated, allege the following upon information and belief based upon personal knowledge:

NATURE OF THE CASE

1. Plaintiff brings this action individually and others similarly situated seeking damages and any other available legal or equitable remedies resulting from

1 the illegal actions of POSITIVE ENERGY SOLUTIONS, LLC (“Defendant”), in
2 negligently, knowingly, and/or willfully contacting Plaintiff on Plaintiff’s cellular
3 telephone in violation of the Telephone Consumer Protection Act, 47 *U.S.C.* § 227
4 *et seq.* (“TCPA”), thereby invading Plaintiff’ privacy.

5 6 **JURISDICTION & VENUE**

7 2. Jurisdiction is proper under 28 *U.S.C.* § 1332(d)(2) because Plaintiff,
8 resident of California, seek relief on behalf of a Class, which will result in at least
9 one class member belonging to a different state than that of Defendant, a company
10 with its principal place of business and State of Incorporation in Florida state.
11 Plaintiff also seeks up to \$1,500.00 in damages for each call in violation of the
12 TCPA, which, when aggregated among a proposed class in the thousands, exceeds
13 the \$5,000,000.00 threshold for federal court jurisdiction. Therefore, both diversity
14 jurisdiction and the damages threshold under the Class Action Fairness Act of 2005
15 (“CAFA”) are present, and this Court has jurisdiction.

16 3. Venue is proper in the United States District Court for the Northern
17 District of California pursuant to 18 *U.S.C.* 1391(b) and 18 *U.S.C.* § 1441(a)
18 because Defendant does business within the state of California and Plaintiff resides
19 within this District.

20 **PARTIES**

21 4. Plaintiff, SIDNEY NAIMAN (“Plaintiff”), is a natural person residing
22 in San Ramon, California and is a “person” as defined by 47 *U.S.C.* § 153 (39).

23 5. Defendant, POSITIVE ENERGY SOLUTIONS, LLC (“Defendant”),
24 is a energy procurement company and is a “person” as defined by 47 *U.S.C.* § 153
25 (39).

26 6. The above named Defendant, and its subsidiaries and agents, are
27 collectively referred to as “Defendants.” The true names and capacities of the
28 Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are

1 currently unknown to Plaintiff, who therefore sues such Defendants by fictitious
2 names. Each of the Defendants designated herein as a DOE is legally responsible
3 for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the
4 Complaint to reflect the true names and capacities of the DOE Defendants when
5 such identities become known.

6 7. Plaintiff are informed and believe that at all relevant times, each and
7 every Defendant was acting as an agent and/or employee of each of the other
8 Defendants and was acting within the course and scope of said agency and/or
9 employment with the full knowledge and consent of each of the other Defendants.
10 Plaintiff are informed and believe that each of the acts and/or omissions complained
11 of herein was made known to, and ratified by, each of the other Defendants.

12 **FACTUAL ALLEGATIONS**

13 8. Beginning in or around August of 2018, Defendant contacted Plaintiff
14 on his cellular telephone, number ending in -6535, in an effort to sell or solicit
15 Plaintiff to purchase Defendant's services.

16 9. Defendants used an "automatic telephone dialing system" as defined
17 by 47 U.S.C. § 227(a)(1) to place its call to Plaintiff seeking to solicit its services.

18 10. Defendants contacted or attempted to contact Plaintiff from multiple
19 telephone numbers confirmed to be Defendant's number.

20 11. Defendant's calls constituted calls that were not for emergency
21 purposes as defined by 47 U.S.C. § 227(b)(1)(A).

22 12. Defendant's calls were placed to telephone number assigned to a
23 cellular telephone service for which Plaintiff incur a charge for incoming calls
24 pursuant to 47 U.S.C. § 227(b)(1).

25 13. Plaintiff is not a customer of Defendant's services and has never
26 provided any personal information, including his cellular telephone numbers, to
27 Defendant for any purpose whatsoever. Plaintiff has been registered on the Do-
28 Not-Call Registry for at least thirty (30) days prior to Defendant contacting him.

1 Accordingly, Defendant never received Plaintiff “prior express consent” to receive
2 calls using an automatic telephone dialing system or an artificial or prerecorded
3 voice on their cellular telephone pursuant to 47 U.S.C. § 227(b)(1)(A).

4 **CLASS ALLEGATIONS**

5 14. Plaintiff brings this action on behalf of themselves and all others
6 similarly situated, as a member of the proposed class (hereafter “The Class”)
7 defined as follows:

8
9 All persons within the United States who received any
10 telephone calls from Defendant to said person’s cellular
11 telephone made through the use of any automatic
12 telephone dialing system or an artificial or prerecorded
13 voice and such person had not previously consented to
14 receiving such calls within the four years prior to the
15 filing of this Complaint

16 15. Plaintiff represent, and are members of, The Class, consisting of All
17 persons within the United States who received any telephone calls from Defendant
18 to said person’s cellular telephone made through the use of any automatic telephone
19 dialing system or an artificial or prerecorded voice and such person had not
20 previously not provided their cellular telephone number to Defendant within the
21 four years prior to the filing of this Complaint.

22 16. Defendant, its employees and agents are excluded from The Class.
23 Plaintiff do not know the number of members in The Class, but believes the Class
24 members number in the thousands, if not more. Thus, this matter should be
25 certified as a Class Action to assist in the expeditious litigation of the matter.

26 17. The Class is so numerous that the individual joinder of all of its
27 members is impractical. While the exact number and identities of The Class
28 members are unknown to Plaintiff at this time and can only be ascertained through
appropriate discovery, Plaintiff are informed and believe and thereon allege that
The Class includes thousands of members. Plaintiff allege that The Class members

1 may be ascertained by the records maintained by Defendant.

2 18. Plaintiff and members of The Class were harmed by the acts of
3 Defendant in at least the following ways: Defendant illegally contacted Plaintiff
4 and Class members via their cellular telephones thereby causing Plaintiff and Class
5 members to incur certain charges or reduced telephone time for which Plaintiff and
6 Class members had previously paid by having to retrieve or administer messages
7 left by Defendant during those illegal calls, and invading the privacy of said
8 Plaintiff and Class members.

9 19. Common questions of fact and law exist as to all members of The
10 Class which predominate over any questions affecting only individual members of
11 The Class. These common legal and factual questions, which do not vary between
12 Class members, and which may be determined without reference to the individual
13 circumstances of any Class members, include, but are not limited to, the following:

- 14
- 15 a. Whether, within the four years prior to the filing of this
16 Complaint, Defendant made any call (other than a call made for
17 emergency purposes or made with the prior express consent of
18 the called party) to a Class member using any automatic
19 telephone dialing system or any artificial or prerecorded voice
20 to any telephone number assigned to a cellular telephone
21 service;
 - 22 b. Whether Plaintiff and the Class members were damages
23 thereby, and the extent of damages for such violation; and
 - 24 c. Whether Defendant should be enjoined from engaging in such
25 conduct in the future.

26 20. As persons that received numerous calls from Defendant using an
27 automatic telephone dialing system or an artificial or prerecorded voice, without
28 Plaintiff' prior express consent, Plaintiff are asserting claims that are typical of The
Class.

21. Plaintiff will fairly and adequately protect the interests of the members
of The Class. Plaintiff have retained attorneys experienced in the prosecution of

1 class actions.

2 22. A class action is superior to other available methods of fair and
3 efficient adjudication of this controversy, since individual litigation of the claims
4 of all Class members is impracticable. Even if every Class member could afford
5 individual litigation, the court system could not. It would be unduly burdensome
6 to the courts in which individual litigation of numerous issues would proceed.
7 Individualized litigation would also present the potential for varying, inconsistent,
8 or contradictory judgments and would magnify the delay and expense to all parties
9 and to the court system resulting from multiple trials of the same complex factual
10 issues. By contrast, the conduct of this action as a class action presents fewer
11 management difficulties, conserves the resources of the parties and of the court
12 system, and protects the rights of each Class member.

13 23. The prosecution of separate actions by individual Class members
14 would create a risk of adjudications with respect to them that would, as a practical
15 matter, be dispositive of the interests of the other Class members not parties to such
16 adjudications or that would substantially impair or impede the ability of such non-
17 party Class members to protect their interests.

18 24. Defendant has acted or refused to act in respects generally applicable
19 to The Class, thereby making appropriate final and injunctive relief with regard to
20 the members of the California Class as a whole.

21 **FIRST CAUSE OF ACTION**

22 **Negligent Violations of the Telephone Consumer Protection Act**
23 **47 U.S.C. §227 et seq.**

24 25. Plaintiff repeat and incorporate by reference into this cause of action
25 the allegations set forth above at Paragraphs 1-25.

26 26. The foregoing acts and omissions of Defendant constitute numerous
27 and multiple negligent violations of the TCPA, including but not limited to each
28 and every one of the above cited provisions of 47 U.S.C. § 227 et seq.

27. As a result of Defendant's negligent violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and the Class Members are entitled an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

28. Plaintiff and the Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

SECOND CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act 47 U.S.C. §227 *et seq.*

29. Plaintiff repeat and incorporate by reference into this cause of action the allegations set forth above at Paragraphs 1-29.

30. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above cited provisions of 47 U.S.C. § 227 *et seq.*

31. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and the Class members are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

32. Plaintiff and the Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff request judgment against Defendant for the following:

FIRST CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act 47 U.S.C. §227 *et seq.*

- As a result of Defendant's negligent violations of 47 U.S.C. §227(b)(1), Plaintiff and the Class members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to 47 U.S.C. 227(b)(3)(B); and

- Any and all other relief that the Court deems just and proper.

SECOND CAUSE OF ACTION

**Knowing and/or Willful Violations of the Telephone Consumer Protection Act
47 U.S.C. §227 et seq.**

- As a result of Defendant's willful and/or knowing violations of 47 U.S.C. §227(b)(1), Plaintiff and the Class members are entitled to and request treble damages, as provided by statute, up to \$1,500, for each and every violation, pursuant to 47 U.S.C. §227(b)(3)(B) and 47 U.S.C. §227(b)(3)(C); and

- Any and all other relief that the Court deems just and proper.

Respectfully Submitted this 6th Day of May, 2019.

LAW OFFICES OF TODD M. FRIEDMAN, P.C.

By: /s/ Todd M. Friedman

Todd M. Friedman

Law Offices of Todd M. Friedman

Attorney for Plaintiff